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No. 722

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In The Supreme Court of The United States

October Term, 1962

WAREHOUSEMENS, TEAMSTERS, CHAUFFEURS, & HELPERS LOCAL UNION #542,

Petitioner,

vs.

SUPERIOR COURT OF STATE OF CALIFORNIA IN AND FOR COUNTY OF SAN DIEGO, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	3
Statutes involved	3
Statement	4
Reasons for granting the writ	11
Conclusion	19

Appendices:

Appendix A--Judgment, San Diego Superior Court, May 21, 1957	App. p. 1
Appendix B--Opinion, Cal. Dist. Ct. California	App. p. 3
Appendix C--Memorandum opinion, San Diego Sup. Court, May 17, 1962	App. p. 28
Appendix D--Order, Cal. Dist. Ct., July 13, 1962	App. p. 30
Appendix E--Order, Cal. S. Ct., Aug. 8, 1962	App. p. 31
Appendix F--National Labor Relations Act, as amended (in part)	App. p. 32

TABLE OF AUTHORITIES CITED

Page

CASES

Alfred M. Lewis, Inc., et al. v. Warehousemens Local 542, et al., 163 Cal. App. 2d 771, 330 P. 2d 53 (1958) 8, 9, 11, 15

Bandini Co. v. Superior Court, 284 U.S. 8 (1931) 17

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 17

Calif. Dump Truck Owners Assn. v. Heavy Highway, Bldg. & Construction Teamsters Committee for Northern California, 31 U.S.L.W. 3186 (U.S. Dec. 3, 1962) . 14

Charles Doud Box Co., Inc. v. Courtney, 368 U.S. 502 (1962) 13, 15

Ex parte George, 31 U.S.L.W. 3164 (U.S., Nov. 13, 1962) 13

Hammerstein v. S'r Ct., 341 U.S. 491 (1951) 17

Heavy Highway Teamsters Committee v. S'r Ct., 203 A.C.A. 665, 21 Cal. Rptr. 840 (1962) 14

TABLE OF AUTHORITIES CITED (Cont'd.)

CASES	Page
Local 24, Teamsters v. Oliver, 358 U.S. 283 (1959) and 362 U.S. 605 (1960)	13
Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962)	13, 15
Los Angeles Meat & Provision Drivers Union, Local 626, et al., v. United States, 31 U.S.L.W. 4009 (Nov. 19, 1962)	15
Marine Engineers v. Interlake Steamship Company, 370 U.S. 173 (1962)	17
San Diego Bldg. Trades Council v. Garmon, 353 U.S. 26 (1957) ("Garmon I")	8, 11
San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) ("Garmon II")	9, 11, 12 13, 15 16, 17
Smith v. Evening News Assn., 31 U.S.L.W. 4041 (U.S., Dec. 10, 1962)	13, 15

TABLE OF AUTHORITIES CITED (Cont'd)

	Page
STATUTES	
Cal. Bus. & Prof. Code, Div. 7, Part 2, Ch. 2	8
Labor Management Relations Act, 29 U. S. C., Sec. 141	3, 13
National Labor Relations Act, 29 U. S. C., Sec. 151	3, 14, 17
ARTICLES	
McCoid, "Notes on a "G-String"," 44 Minn. L. Rev. 205, at 221-222, and n. 74 (1959)	12

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. _____

WAREHOUSEMEN, TEAMSTERS,
CHAUFFEURS & HELPERS, ETC.,

Petitioners,

vs.

SUPREME COURT OF STATE OF
CALIFORNIA,

Respondent.

ALFRED M. LEWIS, INC.,

Real Party in Interest

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of the State of California entered on August 8, 1962.

CITATIONS AND OPINIONS BELOW

The Judgment of the Superior Court of San Diego County of the State of California, a court of general jurisdiction, dated May 21, 1957, is unreported and is printed in Appendix "A" hereto, infra page 1. The opinion of the Fourth District Court of Appeal of the State of California, printed in Appendix "B" hereto, infra, page 3, is reported in 163 Cal. App. 2d 771, 330 P. 2d 53 (1958). The memorandum of opinion of the Superior Court of San Diego County of the State of California, a court of general jurisdiction, dated May 17, 1962, is unreported and is printed in Appendix "C" hereto, infra page 28. The order of the Fourth District Court of Appeal of the State of California, denying a writ of prohibition or certiorari (in the alternative) is dated July 13, 1962; this order is unreported and without opinion and is printed in Appendix "D" hereto, infra page 30. The order of the Supreme Court of the State of California denying a writ of prohibition or certiorari (in the alternative) is dated August 8, 1962; this order is also unreported and without opinion and is printed in Appendix "E" hereto, infra page 31.

JURISDICTION

The Order of the Supreme Court of the State of California was entered in August 8, 1962. Appendix, page 31, infra. The Order of Mr. Justice Douglas extending time to file petition for writ of certiorari is dated November 3, 1962, and by its terms extends said time to January 4, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. section 1257.

QUESTIONS PRESENTED

1. Does a state court have legal or equitable jurisdiction over concerted activities arguably within the jurisdiction of the National Labor Relations Board, on the ground that such activities allegedly violate state antitrust law?

2. If the answer to (1) is yes, does a state court have jurisdiction to determine whether a group of employees engaged in such activities is or is not a "labor organization" as that term is used in section 2 (5) of the National Labor Relations Act?

3. If the answer to (1) and (2) are yes, does a state court have jurisdiction to determine that an autonomous group of thirty employees is not a "labor organization", but that its parent body of some 2000 members is a "labor organization", in order to impose liability on the latter for the concerted activities of the former group?

STATUTES INVOLVED

The statutory provisions involved are the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. section 151, as amended by the Labor Management Relations Act (Taft-Hartley), 61 Stat. 136, 29 U. S. C. section 141. These statutes are set forth in pertinent part in Appendix "F" hereto, infra page 32.

STATEMENT

A. The Concerted Activities Involved.

The primary parties involved in the basic dispute are Alfred M. Lewis, Inc., the Real Party in Interest herein and the Plaintiff below; Warehousemens Local 542, the Petitioner herein, and a Defendant below; and the San Diego Fresh Fruit and Vegetable Dealers Association and its members, Defendants below.

The San Diego Fresh Fruit and Vegetable Dealers Association is an informal, voluntary association of produce dealers known as "The Street". "The Street" derives its name from the fact that it is located in a two block area of Sixth Street in the City of San Diego, California. The Street customarily negotiated labor contracts as a body with the Petitioner.

Alfred M. Lewis, Inc. finances a co-operative association entitled "Orange Empire." This structure has permitted the Lewis corporation notable economic advantages in avoiding the burden of state and federal taxation. On the issue of interstate commerce, it was established that the approximate gross volume of sales of Orange Empire in 1956-1957 -- the period in question -- was $180,000,000. Through Orange Empire, Lewis served approximately thirteen hundred outlets in California, Arizona, Nevada, and New Mexico from 35 warehouses.

Petitioner negotiated separately with Safeway Stores, a modern, vertically-integrated grocery operation, on behalf of grocery personnel who were members of Petitioner. The contract rate of identical labor was

considerably higher for Safeway than for the Street.

On May 5, 1956, Lewis entered an arrangement with the Rideout Produce Company and established a new produce operation in San Diego. Prior thereto, Lewis had primarily served grocery stores, and had operated under the same contract with Petitioner as Safeway for its grocery personnel. Lewis had not been a member of the Street since 1940.

The Rideout Produce Company had originally been a member of the Street. However, the new Rideout-Lewis operation was in sharp contrast to the Street, in that these facilities were as modern as it was possible to build, whereas the Street facilities were generally obsolescent. Rideout-Lewis were thus able to perform a greater volume of work with fewer employees and with a significant economic advantage in reduced labor costs.

In addition, Rideout-Lewis appears to have had advantages similar to those of Safeway, who sells only to its own stores, known as "captive accounts". Because of the Orange Empire co-operative, the members of Petitioner who worked for Rideout-Lewis regarded their employer as having "semi-captive accounts" which permitted them, like Safeway, to buy in larger quantity with less risk of loss.

The segment of the members of Petitioner who worked for Rideout-Lewis thus believed that its employers were in the grocery industry, and hence should be bound by a grocery contract such as that of Safeway, rather than a produce contract, such as that of the Street.

Petitioner is a general Local Union whose 2000 members customarily hold meetings according to the nature of their employment interest. As reflected in the Union minutes, the union members employed on the Street held their own meetings as one segment, and the 25 or 30 members employed by Lewis-Rideout met as another segment. This procedure was, and is, in accord with the standard operation and procedure of Petitioner, which does not require general participation of the membership when a segment thereof is considering issues of striking or wage negotiation.

On May 10, 1956, the Rideout-Lewis segment informed Rideout that because of his deal with Lewis, the Union would negotiate with him separately. This they proceeded to do. Pursuant to a series of meetings held and attended by this segment, and this segment only, Rideout was asked for a grocery contract at the Safeway rate. A business agent of Petitioner, acting on instructions from this segment, agreed to an interim contract with Rideout-Lewis at a halfway mark between the Street and the Safeway rate, with the understanding that Rideout-Lewis would accept the Safeway rate after the six-month interval. This agreement was accepted by the segment by majority vote taken by secret ballot.

No member of Petitioner received a contribution from any employee to influence his vote; no employer was present at any of these meetings; no one influenced any Union member to vote in any particular way.

About a month prior to the expiration of the interim agreement, the segment began negotiations with Rideout Lewis for the grocery (Safeway) rate. Rideout-Lewis responded by hiring a professional labor contract

negotiator, to represent them in bargaining with the segment.

When negotiations for the grocery scale broke down, the segment voted to strike. This action was taken, as was the determination to seek the grocery scale, and an earlier affirmative strike vote, as a result of a secret ballot among the segment members only.

Participation in the strike, which took place on April 1, 1957, was limited exclusively to the members of the Rideout-Lewis segment. The strike lasted about three weeks, and, in the opinion of the striking segment, was lost when Lewis terminated his produce operation with Rideout. Pursuant to the parliamentary safeguards, the segment voted to go back to work for Rideout at the Street rate and ultimately accepted a Street contract from him.

At no time did Rideout, Lewis or any of their representatives, including their professional labor negotiator, seek the assistance of the National Labor Relations Board for bargaining unit certification, charges of unfair labor practice, or any other relief available through the Board.

B. Litigation and Jurisdiction.

On April 3, 1957 an action was filed in the Superior Court of San Diego County, State of California, entitled Alfred M. Lewis, Inc., A corporation, and Rideout Produce Co., A Corporation, v. Warehousemens, Teamsters, Chauffeurs, and Helpers Local Union No. 542, et al., Number 213850 on the Court Docket. Included in the numerous parties defendant was the Petitioner in

this proceeding. The complaint seeks double damages against Petitioner for alleged restraint of trade, specifically alleging in Paragraph XIV thereof, a "conspiracy, agreement and combination . . . in violation of Division 7, Part 2, Chapter 2 of the Business and Professions Code of the State of California and contrary to the public policy of said State, as set out therein." The gist of the complaint was that the strike by the segment of Petitioner on April 1, 1957, had been designed to destroy competitive marketing in San Diego, and force Plaintiffs out of business.

Petitioner responded by filing a demurrer to the complaint, urging, inter alia, that the state court was without jurisdiction of the subject matter of the action, on the authority of San Diego Building Trades Council v. Garmon, 353 U. S. 26 (1957) and allied cases.

Upon the overruling of the demurrer without opinion, Petitioner on April 12, 1957, filed an answer to the complaint, urging in affirmative defenses the doctrine of federal pre-emption.

On September 26, 1958, the court held for Petitioner, finding in its findings of fact and conclusions of law that "jurisdiction of the controversies . . . is vested solely in the National Labor Relations Board"; that "under the National Labor Relations Act the right to strike is guaranteed to defendant labor union," and that "the right thus made legal by the laws of the United States may not be made illegal by the antitrust laws of the State of California"; that defendants had violated no federal law and that "judgment should be rendered against the plaintiffs." (Quoted in Alfred M. Lewis, Inc. v. Warehousemens Local 542 et al., 163 Cal. App. 2d 771, 330 P. 2d 53

(1958).)

Plaintiffs appealed to the California District Court, which reversed, in Alfred M. Lewis, Inc. v. Warehousemens Local 542 et al., 163 Cal. App. 2d 771, 330 P.2d 53 (1958). The court then held, in 1958, that a state court did have jurisdiction to award damages against a union engaged in interstate commerce for concerted activities found violative of state antitrust law; and remanded for a new trial.

On September 6, 1960, Plaintiff Lewis filed a first amended complaint in which the claim for damages was raised to one million dollars, which sum was to be doubled "pursuant to statute"; and repeated his claims for injunctive relief from strikes, picketing and boycott.

On November 6, 1961, the retrial of the remanded Case No. 213850 commenced in Superior Court of San Diego County. By stipulation of counsel, the trial was bifurcated so that the issue of damages need not be tried unless liability was found by the court. At retrial on the issue of liability, evidence was again adduced by Petitioner to show that Plaintiff was in interstate commerce and that the dispute in question was arguably within sections 7 and 8 of the National Labor Relations Act, as amended.

On May 4, 1962, Petitioner submitted its trial brief on the issue of liability. The substance of this brief was, once again, devoted to the issue of jurisdiction of the court, with particular reference to the doctrine of federal pre-emption established in the second Garmon decision, San Diego Building Trades Council vs. Garmon, 359 U.S. 236 (1959), decided

by this Court subsequent to remand by the District Court of Appeal.

On May 17, 1962, the Superior Court issued its Memorandum Opinion in Case No. 213580, printed as Appendix C hereto, infra, page 28. This opinion held that the court did have jurisdiction, and found defendants, including Petitioner, liable. This opinion made no distinction between the segment of Petitioner which participated in the strike and the Union as a whole, which was unaware of it.

The opinion further held that unless its decision as to jurisdiction was contested, trial would resume following June 10, 1962.

Thereupon Petitioner did further contest the jurisdiction of the state court by filing a petition for Writ of Prohibition or Certiorari (in the alternative) in the California District Court of Appeal, again urging federal pre-emption and the Garmon doctrine. On July 13, 1962, the district court, in Warehousemen, Teamsters, Chauffeurs & Helpers Local Union No. 542 v. Superior Court, etc., denied said petition without opinion. A copy of the order of the court is appended as Appendix "D", infra, page 30.

Petitioner thereupon appealed the denial of a writ of prohibition or certiorari to the California Supreme Court, again urging federal pre-emption. On August 8, 1962, that court denied said petition without opinion. A copy of the order of the California Supreme Court is attached as Appendix "E" hereto, infra, page 31.

It is to the order of the California Supreme Court

of August 8, 1962, that Petitioner seeks certiorari, having obtained by order of this Court dated November 3, 1962, an extension of time for that purpose.

REASONS FOR GRANTING THE WRIT

1. The instant case is clearly one in which a state court has decided a substantial federal question in a way not in accord with applicable decisions of this Court.

At the first trial of the action below, the trial court concluded that it had no jurisdiction in that "juridsiction of the controversies involved between the plaintiffs and the defendants is vested solely in the National Labor Relations Board". (Quoted in Alfred M. Lewis, Inc., et al., v. Warehousemens Local 542, et al., cited supra.)

However, on the basis of an interpretation of San Diego Building Trades Council v. Garmon, 353 U.S. 26 (1957), herein "Garmon I", rendered untenable by the second Garmon decision, 359 U.S. 236 (1959), herein "Garmon II," the California District Court reversed the trial court and ordered a retrial.

Thus, the district court distinguished between state court jurisdiction to grant equitable relief in a labor dispute affecting commerce and ruled, prior to Garmon II, that an action for damages would lie even though equitable relief was foreclosed by Garmon I. Not long thereafter, this Court declared:

> "When an activity is arguably subject to Section 7 or Section 8 of the [National

> Labor Relations Act, the states as well as the federal courts must defer to the exclusive competence of the . . . Board if the danger of state interference with national policy is to be averted.
>
> ". . . Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate . . . In fact, since remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict." (San Diego Building Trades Council v. Garmon, 359 U.S. 236, at 245-247.)

The above opinion of the Court was authored by Mr. Justice Frankfurter. It has been noted that this opinion strongly negates any inference to be found in earlier opinions of Justice Frankfurter that state regulation different in kind and in policy from the Labor Board might be valid; and it has been reasoned by at least one legal authority that one basis for the firmness of this decision was the number of cases in which state courts had intervened where the conduct of unions was federally protected. Specifically cited as an instance of such a "doubtful state decision" motivating Garmon II is the decision of the District Court of Appeal in the instant case. McCoid, "Notes on a 'G-String,'" 44 Minn. L. Rev. 205, at 221-222 and n. 74 (1959).

Thus, although correctly decided at the first trial, in the light of Garmon II and subsequent decisions of this Court, the instant case has been relitigated according to what has been shown to be a clearly erroneous interpretation of the federal pre-emption doctrine. And it is on that erroneous interpretation that the present finding of jurisdiction and liability is based.

Subsequent decisions of this Court further illustrate the error of the determination of jurisdiction and liability herein. Thus, in Local 24, Teamsters v. Oliver, 358 U.S. 283 (1959) and 362 U.S. 605 (1960), this Court reversed an Ohio state court decision enjoining a collective bargaining agreement found violative of state antitrust law, applying the federal pre-emption doctrine announced in Garmon.

The rule of Oliver applies a fortiori to the instant case. For unlike Oliver, no issue is presented here of possible state court jurisdiction under section 301 of the Labor Management Relations Act to enforce, or to remedy violations of, collective bargaining agreements. Thus, recent decisions of this Court recognizing state court jurisdiction over section 301 questions have no application to this case, either in policy or in fact, inasmuch as no issue of contract violation or enforcement was ever raised. Cf. Smith v. Evening News Assn., 31 U.S.L.W. 4041 (U.S. Dec. 10, 1962); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, (1962); Charles Dowd Box Co., Inc. v. Courtney, 368 U.S. 502 (1962).

Instead, in this case as in Ex parte George, 31 U.S.L.W. 3164 (U.S., Nov. 13, 1962), the court has sought to vitiate organizational rights guaranteed by

section 7 of the National Labor Relations Act, as amended; and as in George, the picketing of the Petitioner's segment herein was at least arguably prohibited or arguably protected by the same provisions of the Act there found relevant.

2. Granting the writ will resolve present conflicts of judicial doctrine.

On December 3, 1962, this Court denied certiorari in California Dump Truck Owners Assn. v. Heavy, Highway, Bldg. & Construction Teamsters Committee for Northern California, 31 U.S.L.W. 3186 (U.S. Dec. 3, 1962). This petition arose from the issuance of a writ of prohibition by a California District Court to restrain a state court from hearing an action to enjoin the enforcement of a collective bargaining agreement. As in the instant case the action was brought under the California antitrust law on the theory that the contract was a restraint of trade. However, in the Dump Truck decision, the district court granted the writ, ruling at 203 A.C.A. 665, 21 Cal. Rptr. 840 (1962), that the National Labor Relations Act, as amended, does deprive a California state court of jurisdiction of a suit by state-regulated truck owner-operators to enjoin enforcement of a union contract with a contractors association, even though the terms of the contract allegedly violate California antitrust law.

The granting of the writ by the California court in the Dump Truck decision, and the denial of the writ in the instant case, results in the anomalous doctrine that application of state antitrust law is pre-empted as to union contracts with perhaps unlawful provisions in restraint of trade, but not so as to economic action such as

strikes or picketing. Such a rule is made all the more improbable by the Evening News, Lucas Flour, and Doud Box decisions, cited supra, holding that state courts are not pre-empted from adjudicating suits on union contracts.

Review of the instant case will also resolve issues raised by the recent decision of this Court in Los Angeles Meat and Provision Drivers Union, Local 626, et al., v. United States, 31 U.S.L.W. 4009 (Nov. 19, 1962). Contrary to Local 626, there has been a clear showing in the instant case of countervailing, legitimate labor objectives by the action deemed by California to be in violation of its restraint of trade laws. Thus, whereas the Local 626 decision permits a divestment order under federal antitrust statutes where no legitimate labor objectives are shown, Alfred M. Lewis would permit an award of damages under state antitrust law for strikes and picketing for higher wages otherwise protected by the National Labor Relations Act.

It is apparent that such a rule of law can readily swallow up the entire pre-emption doctrine of Garmon II, resulting in such a plethora of state antitrust litigation against labor organizations as to effectively and totally deny the protection of the National Labor Relations Act.

The instant case is therefore an excellent vehicle for clarifying the troublesome implications of the application of antitrust law raised by Local 626, and for reaffirming the policies embodied in Mr. Justice Frankfurter's original opinion in Garmon II.

3. To permit state courts to decide whether or not a group of employees is a "labor organization" will contound the policies of the National Labor Relations Act, and the purposes of the federal pre-emption doctrine.

In the portion of the Garmon II decision quoted supra, Mr. Justice Frankfurter observed, at 247, that "since remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict." The remedy in question was, of course, damages, which the California state court will impose in the instant case unless certiorari is granted by this Court.

However, in this case, the danger is two-fold: for the state court proposes not only to grant a remedy in conflict with Board regulation, but also to adjudicate labor organization status, which, it is submitted, is very likely in conflict with a Board determination, and far more obnoxious to a uniform scheme of federal labor law. Thus, the state court has already decreed that the Petitioner -- with a membership in excess of 2000 -- may be held liable in damages for the activities of some 25 or 30 members of a semi-autonomous segment. In view of the potential double damages award of two million dollars sought by plaintiff, it is evident that the ability of the state court to determine what is or is not a "labor organization" gives the court tremendous power to impose sanctions far beyond those given to the Board.

Further, it is submitted that the determination of the state court that the segment is not a labor organization, but that the Petitioner is, is contrary to the broad

and inclusive definition of that term in Section 2(5) of the National Labor Relations Act, as amended, quoted in Appendix "F", page 32 infra.

The unwisdom of permitting state courts to make such determinations was recognized by this Court as recently as June 11, 1962, in Marine Engineers v. Interlake Steamship Company, 370 U.S. 173. Citing Garmon II as authority, this Court then said that the "task of interpreting and applying the statutory definition of a 'labor organization' " required "the same adjudicatory expertise that the Board must bring to bear when it determines the applicability of §§ 7 and 8 of the Act to substantive conduct."

The instant case is an exemplar of the necessity for a state court to yield to such expertise.

4. Finality and Jurisdiction.

That this Court considers denial of writ of prohibition a 'final judgment' for purposes of granting certiorari was established in Bandini Co. v. Superior Court, 284 U.S. 8, 14 (1931).

In Hammerstein v. Superior Court, 341 U.S. 491, (1951) this Court again held that there was jurisdiction by certiorari from a denial of prohibition, but emphasized the possible improvidence of taking such jurisdiction.

In the instant case, it is submitted that the grant of certiorari would be clearly provident, falling foursquare into the pragmatic standards considered in Brown Shoe Co. v. United States, 370 U.S. 294 at 306 (1962). Here,

as in Brown Shoe, certiorari will not cause repetitive judicial consideration of the same issues. The basis of this litigation is the jurisdiction of the state court to determine liability and award damages. The objections taken by petition through the California state courts and ultimately to this Court, will, if certiorari is granted, be dispositive. All that remains in the state court is a determination of the amount of damages; and the bifurcation of the trial was designed to permit a complete adjudication of the issue of liability before damages issue is considered. Obviously, there can be no such complete adjudication until the jurisdiction of the court is determined, whether now or by later appeal. It may be seen that this issue is ripe for consideration by this court in that, if deemed otherwise, the same contentions must again be advanced through the appellate tribunals, after the amount of damages is set, perhaps needlessly, by the trial court.

Finally, if review is denied the present adjudication of liability of Petitioner must needs remain in effect during the litigation of the issue of the amount of damages, and further during such time as decision on appeal would later be forthcoming.

During this period, the Petitioner must continue the organizational efforts which it must needs maintain to survive. However, the adjudication of liability and ultimately of damages is anticipated as a serious impediment to the efforts of Petitioner to carry on its normal organizational activities and maintain its membership. The anticipation of dues being paid as a fund for a damage award to the Plaintiff below, rather than being applied for union purposes, will not only discourage membership in Petitioner with a substantial

irreparable loss of revenues, but will also encourage termination of affiliation by the present membership.

Finally, not only is the continuing pendency of the action unsettling on the industrial relations of Petitioner, the entire labor organization comprising the Petitioner will be caused during this period to expend monies in the continuance and ultimate appeal of this action, although these interdicted activities in fact involve only a small segment of the Petitioner. Thus, Petitioner will unjustly be held liable for the independent activities of a segment, which sums it will have no way of recouping, inasmuch as it is limited by law to the collection of uniform dues from all of its members.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Walter Wencke,
Counsel for Petitioner

APPENDIX "A"

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA, IN AND FOR
THE COUNTY OF SAN DIEGO

ALFRED M. LEWIS, INC., et al.,	)	No. 213850
Plaintiffs,	)	JUDGMENT
vs.	)	
WAREHOUSEMEN, TEAMSTERS, CHAUFFERUS, AND HELPERS LOCAL UNION NO. 542, et al.,	)	
Defendants.	)	

The above action came on for trial on April 15, 1957, in Department 9 of the above entitled court, before the Honorable C. M. MONROE, judge presiding, sitting without a jury, HILLYER & CRAKE, by WILLIAM HILLYER and OSCAR IRWIN, appearing as attorneys for plaintiffs, WALTER WENCKE, appearing for defendant, Local Union No. 542, JACK POTEET, JACK RAFN and CECIL NOLEY; DONNELLEY, MAC NULTY & BUTLER, by RICHARD MAC NULTY, appearing as attorneys for defendants, JOHN J. SATIROS, WILLARD SNYDER, BAY CITY PRODUCE CO., DAVID PRODUCE CO., FARMERS PRODUCE DISTRIBUTORS, MIKE A. GERACI and RICHARD W. GERACI, dba MIKE'S PRODUCE, GROWERS MARKETING CO., INC., a corporation, LEON TELANDER, dba J & G PRODUCE, SAM MOCERI, dba MOCERI PRODUCE, MANOS BROTHERS,

INC., a corporation, SAM MARINOS, dba SAM MARINOS PRODUCE, HENRY A. POZNER, A. R. SLEEPER, VITO BERTOLINO, ABE J. TIRADO, dba TIRADO PRODUCE, ADOLPH ROBLE, dba ROBLE'S AVOCADO DISPATCH and SAN DIEGO FRESH FRUIT AND VEGETABLE DEALERS ASSOCIATION, an unincorporated association; and E. A. LUCE, appearing as attorney for defendant, COAST CITRUS DISTRIBUTORS, INC., and oral and documentary evidence having been introduced on behalf of both parties, and the court having considered same and heard arguments of counsel and being fully advised in the premises, makes its findings of fact and conclusions of law in writing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiffs recover nothing in this action and that any and all preliminary injunctions be vacated, and that plaintiffs have no injunctive relief and recover no damages.

IT IS FURTHER ORDERED AND ADJUDGED that each party hereto shall pay its own costs.

Done in Open Court this 21st day of May, 1957.

C. M. MONROE
Judge of the Superior Court

APPENDIX "B"

IN THE DISTRICT COURT OF APPEAL
FOURTH APPELLATE DISTRICT
STATE OF CALIFORNIA

ALFRED M. LEWIS, Inc., a corporation, and RIDEOUT PRODUCE CO., a corporation, Plaintiffs, vs. WAREHOUSEMEN, TEAMSTERS, CHAUFFEURS AND HELPERS LOCAL UNION NO. 542, an unincorporated association, et al., Defendants and Respondents. ALFRED M. LEWIS, Inc., a corporation. Appellant.	)	4th Civil 5830

OPINION

APPEAL from a judgment of the Superior Court of San Diego County. C. M. Monroe, Judge. Reversed.

Hillyer & Crake and Oscar F. Irwin for Appellant.

Donnelley, MacNulty & Butler for Respondents

Luce, Forward, Kunzel & Scripps for Respondent Coast Citrus Distributors, Inc.

Walter Wencke for Respondent Members of Local No. 542.

McLaughlin & Casey and James A. McLaughlin, Amicus Curiae in behalf of Appellant.

Edmund G. Brown, Attorney General, and Wallace Howland, Assistant Attorney General, Amicus Curiae in behalf of State of California.

Action for injunction and damages.

Alfred M. Lewis, Inc. and Rideout Produce Co., corporations, are produce dealers in San Diego, California. Alfred M. Lewis, Inc. is engaged in interstate business, operating grocery stores in many states.

Shortly before May 3, 1956, the Rideout company agreed to service certain produce accounts of the Lewis company. At this time the Rideout company, together with other corporations and individuals engaged in the wholesale produce business, were members of an unincorporated association known as the San Diego Fresh Fruit and Vegetable Dealers Association (hereinafter referred to as the "Association"). Among other things, the purpose of the Association was to set as a collective bargaining unit on behalf of its members with labor organizations, including the Warehousemen, Teamsters, Chauffeurs and Helpers Local Union No. 542 (hereinafter referred to as the "Union"). This Union was an

unincorporated association affiliated with the International Teamsters Brotherhood of America. As a bargaining unit, the Association concerned itself with the negotiation of contracts respecting wages and hours of persons employed by its members in order to effect a uniformity of agreements between them concerning these matters.

When the Lewis company and the Rideout company joined forces they entered into competition with the other members of the Association, who became apprehensive and, by reason thereof, the Association "entered into an understanding and arrangement with the Union and its . . . officers, wherein and whereby . . . Rideout Produce Co. was to be excluded from the collective bargaining arrangement theretofore existing" and the "Union was to demand from" the Lewis company and the Rideout Company an "increase in wages sufficient to render competition with" the Association's "produce dealers unprofitable". Thereupon, the Rideout company was excluded from the mutual wage agreement in which it had participated with the other members of the Association, and the Union demanded that it execute an agreement for the payment of higher wages. This demand was met and an agreement executed accordingly, which, with some modifications, continued until April 1, 1957. In the meantime, the Rideout and Lewis companies had changed their agreement, to the end that the former rented a portion of its facilities and equipment to the latter, which also took over a number of the Rideout company's employees.

In April, 1957, in furtherance of its agreement with the Association, the Union demanded that the Lewis and Rideout companies execute contracts for wages

sufficiently in excess of those paid by the Association's produce dealers as to render competition with those dealers unprofitable, and, upon refusal of this demand, declared a strike and placed a picket line around the Rideout company's place of business, which was the same place of business for the Lewis company. Thereupon, the two companies brought this action against the Union and the Association to enjoin the strike and the picketing and to recover damages allegedly sustained as a result thereof.

Joined as defendants were certain specifically named officers and agents of the Association, and a great number of fictitiously named individuals, partners and corporations. The complaint alleges that the Union has numerous members; that it is impracticable to bring all of said members into the action as defendants; that most of their names are unknown; and that, for these reasons, the individual members of the Union are made parties defendant and charged with defending the action for the benefit of all other members of the Union. The answers on file, together with the recitals in the findings and judgment, indicate that only those defendants specifically named in the complaint appeared in this action.

The case was tried by the court without a jury. The facts heretofore set forth appear in the findings prepared and signed by the trial judge. In addition, the court specifically found: "That the agreement and arrangement between defendant Local 542 and its defendant officers and defendant produce dealers and the acts done pursuant thereto as aforesaid, were for the purpose of intending to affect and restrict competition

in the distribution of fresh fruits and produce in the city of San Diego and the immediately surrounding area."

From the facts as found the court concluded that the agreement between the defendants "would be in violation of the antitrust laws of the State of California if involving local businesses not engaged in interstate commerce or which affected interstate commerce"; that "jurisdiction of the controversies involved between the plaintiffs and the defendants is vested solely in the National Labor Relations Board"; that "under the National Labor Relations Act the right to strike is guaranteed to defendant labor union . . . and the right thus made legal by the laws of the United States may not be made illegal by the antitrust laws of the State of California"; that the agreement between the defendants "being not unlawful under the laws of the United States" does not constitute a conspiracy; and that "judgment should be rendered against the plaintiffs".

A judgment in favor of the defendants and against the plaintiffs was rendered accordingly, from which the plaintiff Alfred M. Lewis, Inc. appealed on the judgment roll alone, although after the filing of the clerk's transcript on appeal, pursuant to stipulation of all parties, a reporter's transcript was prepared and, after petition for permission to do so, was filed in this court. From a statement contained in the brief on file it appears that following entry of judgment, the plaintiff Rideout Produce Co. dismissed its action with prejudice.

Appellant contends that the trial court erred in drawing the conclusions of law heretofore noted from the facts as found.

Respondents contend that the evidence does not support the trial court's finding of an agreement between them in restraint of trade; that the trial court did not have jurisdiction over any dispute involving either of them; that the Labor Management Relations Act, the National Labor Relations Act, the Sherman Antitrust Act, and other federal legislation has pre-empted the field of law governing any of the controversies in this case; and that the trial court failed to find upon material issues presented by the pleadings.

Although " 'It is well settled that parties who have not appealed cannot attack the findings' " (Henigson v. Bank of America, 32 Cal. 2d 240, 244), and that errors affecting such parties will not be reviewed on appeal (Salter v. Ulrich, 22 Cal. 2d 263, 268), nevertheless, under the authority of Mott v. Horstmann, 36 Cal. 2d 388, 393, the respondents urge this court to affirm the judgment on the ground that there is no evidence to sustain the finding that they entered into an agreement to force appellant out of business; that the judgment is proper because there is no valid finding to support a contrary judgment; and "that an erroneous reason should be disregarded if the decision is correct." (Mott v. Horstmann, supra, 36 Cal. 2d 388, 393.)

In determining the sufficiency of the evidence to sustain a questioned finding, the appellate court must accept as true all evidence and all inferences which reasonably may be drawn therefrom tending to support that finding. (Burke v. Chrostowski, 46 Cal. 2d 444.)

There is no direct evidence of an agreement between the Union and the Association to restrict competition, as set forth in the findings in this case.

The courts have recognized the difficulty attendant upon proof of this kind of an agreement, which the parties in their briefs refer to as a conspiracy. (Johnstone v. Morris, 210 Cal. 580, 590.) Unless one of the conspirators confesses, no direct evidence of such an agreement is available. Consequently, "As a general rule, a conspiracy can be established only by circumstantial evidence." (People v. Steccone, 36 Cal. 2d 234, 237-238; People v. Caslo, 50 A. C. 1, 19-20), and "it is not necessary to show that the parties met and actually agreed to undertake the performance of the unlawful acts." (People v. Sampsell, 104 Cal. App. 431, 438-439; People v. Sorrentino, 146 Cal. App. 2d 149, 159.)

The evidence in this case furnishes direct proof of facts supporting the inferences drawn by the trial court respecting the existence and purpose of the agreement in question.

For a number of years the Rideout company and other members of the Association operated from places of business located in an area centering around Sixth Street in San Diego. For this reason the dealers were referred to as "The Street". In 1954 the Rideout company moved into more commodious and efficient quarters at another location. This move, however, did not change the relationship existing between this company and other members of "The Street". In 1955, as in previous years, a contract had been negotiated between the Union and the Association acting on behalf of its members, including the Rideout company. As heretofore noted, the primary purpose of the Association was to assure the same wage scale for each member, which

was agreed upon by a majority vote. The 1955 contract covered a term of one year and expired April 1, 1956. At this time the members of the Association, including the Rideout company, agreed to stand together respecting a new contract, so that the wage scale applicable to each of them would be the same.

On May 3, 1956, the Rideout company commenced operations under an agreement with the Lewis company, which is a capital structure, to service the accounts of a cooperative venture known as Orange Empire, sponsored by Lewis. The stores which participated in this "co-op" are independent of the Lewis company and are not required to purchase from or through that company or the "co-op"; but if a profit is made by the "co-op" they will share therein. The Rideout company serviced the Orange Empire accounts on a percentage basis without any change in its operation; it conducted the same kind of business theretofore conducted; its agreement with the Lewis company meant only the acquisition of some additional accounts. Nevertheless, on May 5, 1956, two days after the Rideout company started its new operations, a representative of the respondent Union advised Mr. Rideout, president of the company, that because it was handling some business for the Orange Empire "co-op" it would be treated separately from other members of the Association; that it no longer could be a member of that Association; and demanded a substantial wage increase. Under threat of a strike called for May 10th and the probable loss of $50,000 worth of fresh fruits and vegetables than on hand, the Rideout company acquiesced in the Union's demands and agreed to pay in accordance with a wage scale half way between that in effect on "The

Street" and that in effect with the grocery industry of San Diego.

The Safeway stores in San Diego operated under an agreement whereby it paid its produce truck drivers according to the grocery industry scale. During the course of subsequent negotiations the Union and various members of the Association contended that the Rideout and Lewis companies had "captive accounts", such as did Safeway stores and, for this reason, should be treated differently than the dealers on "The Street". However, neither appellant Lewis company nor the Rideout company had any "captive accounts". A "captive account" is a customer which has no choice but to accept merchandise from the dealer as offered regardless of quality, amount or need. At times, stores that were members of the Orange Empire "co-op" purchased produce from dealers on "The Street" and not through the "co-op".

Shortly after his discussion with the Union representative, Mr. Rideout was advised by the President of the Association, as well as some of its members, that the matter had been discussed quite thoroughly by the members of "The Street" and the Union; that the membership was in accord with the Union because Rideout had taken on the Orange Empire produce business; and that Lewis should not have been allowed to go into the produce business.

In July, 1956, the agreement between the Rideout company and the Lewis company was changed. Instead of servicing the Orange Empire "co-op" stores, Rideout rented part of its equipment and plant to the Lewis Company which, in turn, serviced these accounts. The

Lewis company continued to employ some of the Rideout company's employees at the wages agreed upon by the latter company. On several occasions after this, Rideout had discussions with different members of the Association who stated that they would not stand behind him b\ ,ould side with the Union. In January, 1957, one . the members asked Rideout if there was anything he, Rideout, could do to get Orange Empire produce out of business in San Diego and suggested that he dispose of his building to some other industry which would deprive Orange Empire of those facilities.

Some time prior to April 1, 1957, the Union and the Rideout and Lewis companies entered into negotiations concerning a wage contract for that year. Rideout had asked the Association to represent him but this request was refused, even though he was considered a member of the Association. The Union demanded that the two companies pay the same scale as Safeway stores upon the ground that both of them and Safeway stores had "captive accounts". The president of the respondent Association was in accord with the differentiation made by the Union for the same reason. The only difference between the operation of the dealers on "The Street" and that of the Rideout and Lewis companies, which was advanced as a reason for a difference in their classification for wage paying purposes, was the alleged "captive account" difference, which did not exist.

On April 1, which was the renewal date for the contracts under consideration, the dealers on "The Street" were paying $1.80 per hour to their employees. The Union demanded $2.39 1/4 per hour from the Rideout and Lewis companies for their employees. This demand was rejected; a strike was called and a picket line

established. Although the Union representative and members of the Association had stated that a 20¢ an hour increase was being demanded from the dealers on "The Street", no new contract was entered into by them and no strike was called.

In a conference between Mr. Lewis, president of appellant company, Mr. Glore, president of the respondent Association, and Mr. Mercurio, president of Growers Marketing Co., Inc., a member of the Association, it was suggested that Lewis buy out Growers Marketing Company; that if he did so, his troubles with the Union would be over. Lewis accused those present of putting the "tag" on him and they agreed that such was the fact. During the course of the foregoing conversation, in response to a statement by Mr. Mercurio that relations with the Union were peaceful until Lewis came into San Diego, the latter made this accusation: "You're the birds that did this. We didn't." Neither Mr. Mercurio nor Mr. Glore made any reply.

The evidence justifies the conclusion that the Rideout or Lewis companies cannot compete with respondent dealers if required to operate under the differential in wage scale demanded by the Union, which controls the labor market essential to their operations.

The foregoing facts legally sustain the trial court's conclusion that respondents entered into an agreement to restrict competition by establishing a wage differential between appellant and respondent dealers which would make it unprofitable for appellant to compete with those dealers.

By this agreement, and the circumstances attendant

thereupon, appellant had the choice either to accept the Union's demands made pursuant thereto, pay the higher wages and be forced out of the produce business by losses and a lack of profit; or to refuse to pay the higher wages and be forced out of business by a lack of labor and other detrimental consequences resulting from the Union's strike and picketing. The agreement and the conduct of respondents pursuant thereto was in violation of the Cartwright Act which declares unlawful any "combination of capital, skill or acts by two or more persons" (including associations and corporation) for "The purpose of creating or carrying out restrictions in trade or commerce" or "to prevent competition" in the "sale or purchase of merchandise, produce or any commodity." (Bus. & Prof. Code, Secs. 16720, 16726; Speegle v. Board of Fire Underwriters, 29 Cal. 2d 34, 40-42; Caruso v. Abbott, 133 Cal. App. 2d 304, 307; Alpha Beta Mkts. v. Amal. Meat Cutters, 147 Cal. App. 2d 343; Kold Kist v. Amalgamated Meat Cutters, 99 Cal. App. 2d 191, 201.)

In People v. Sacramento Butchers' Protective Assn., 12 Cal. App. 471, 481, where an association of meat dealers and a meat distributing company were charged with entering into a combination to destroy competition in the retail meat business, in violation of the Cartwright Act, because they had agreed to require a named meat dealer to pay a higher price for meat than was required of members of the association, the court said:

> ". . . (t)he object of the statute is to prevent such combinations or conspiracies between persons engaged in a particular line of business as will destroy free competition therein,

> and if the purpose of such combination is to restrict trade or destroy competition in the sale and purchase of 'merchandise, produce or any commodity,' or if such combination tends to restrict trade or to prevent competition therein, such combination is against the letter and paramount object of the law."

If Lewis were forced out of the San Diego produce market, obviously any advantage in price or service which that company might offer buyers in that market would be eliminated.

A violation of the Cartwright Act may be the basis of an action to recover damages for injury sustained as a result thereof and for injunctive relief. (Bus. & Prof. Code, Sec. 16750; Kold Kist Inc. v. Amalgamated Meat Cutters, supra, 99 Cal. App. 2d 191; O'Shea v. Tile Layers Union, 155 Cal. App. 2d 373.)

The trial court determined, as expressed in its conclusions of law, that the agreement in question would have been in violation of the Cartwright Act if it involved "local businesses not engaged in interstate trade or which affected interstate commerce"; but that because appellant was engaged in interstate commerce, the laws of the United States apply; that under these laws the agreement was not unlawful and, consequently, did not constitute a conspiracy. Integrant to this conclusion is the belief of the trial judge, as expressed in his summation at the conclusion of the trial, that an actionable conspiracy involves an agreement to do an unlawful act resulting in damage; that, unless the act resulting in damage is unlawful, independent of the

conspiracy, no cause of action exists, even though the purpose of the conspiracy was to effect such damage; that the damage of which appellant complains resulted from the strike and the picketing invoked by the Union; that, as expressed in his conclusions of law, "under the National Labor Relations Act the right to strike is guaranteed to defendant labor union" and "the right thus made legal by the laws of the United States may not be made illegal by the antitrust laws of the State of California"; consequently, the conspiracy in question was not actionable.

Under the Cartwright Act and similar antitrust legislation, the combination for a particular purpose constitutes the unlawful act. (People v. Sacramento Butchers' Protective Assn., supra, 12 Cal. App. 471, 484; Nash v. United States, 229 U.S. 373, 33 S. Ct. 780, 782; United States v. Trenton Potteries Co., 273 U.S. 392, 402; 47 S. Ct. 377, 381.)

The prohibited combination comes into being through an agreement of two or more persons for the purpose of restraining trade or preventing competition. Conduct used to effect such an agreement may result in actionable damages or be the subject of an injunction, even though such conduct if not used to effect the agreement would be lawful.

In the field of labor litigation it has been recognized that a strike may be lawful or unlawful, depending upon whether the primary objective or purpose for calling the strike is lawful or unlawful. As a consequence, in those instances where the primary purpose of a strike is to restrain trade, even though the working conditions of striking employees may be advanced as an

incident to the accomplishment of the primary purpose, the strike will be enjoined as unlawful. (Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S. Ct. 684; Kold Kist v. Amalgamated Meat Cutters, supra, 99 Cal. App. 2d 191.) "(t)he real test in a particular case is the primary purpose of the agreement or combination in question." (Schweizer v. Local Joint Executive Board, 121 Cal. App. 2d 45, 53.) Under circumstances such as those in the case at bar, the determination of the primary purpose of such an agreement is a question of fact. The findings in this case establish that the purpose of the strike in question was to effect an agreement to destroy competition.

The Union contends that, as the trial court did not find the strike was called only for the purpose of effecting the agreement to destroy competition, a coincident labor purpose must be assumed because of the demand for an increase in wages. A reasonable interpretation of the findings does not justify this assumption. The court found that the agreement between respondents "and the acts done pursuant thereto as aforesaid, were for the purpose of intending to affect and restrict competition in the distribution of fresh fruits and produce in the city of San Diego." To accept respondents' contention would require a trial court to negate all facts which might limit the inclusive nature of a positive finding. This is unreasonable. "(I)f the findings of fact made by the trial court leave some issue or material fact undetermined, such issue of fact will be regarded as not proved by the party having the burden of proof" (53 Am. Jur. 796), unless such fact be implied in the findings made. (Haigler v. Donnelly, 18 Cal. 2d 674, 678.) The contention advanced must be rejected.

The conclusions of law drawn by the trial court focus attention upon the application of federal legislation to this case. Interrelated, and equally pertinent, are inquiries concerning the jurisdiction of the state court, the legality of the transaction under consideration, whether it primarily involves a labor dispute or a restraint of trade, the interstate nature thereof, and its effect upon the Cartwright Act.

If the Labor Management Relations Act applies, the state court has no jurisdiction in the premises, except as the facts may establish a cause of action under state law for damages based upon a tort. (San Diego Bldg. Trades Council v. Garmon, 353 U. S. 26, 77 S. Ct. 607; Garmon v. San Diego Bldg. Trades Council, 49 Cal. 2d 595.)

The Labor Management Relations Act, which includes the National Labor Relations Act, governs labor disputes, unfair labor practices, and the concerted activity of employees for their mutual aid or protection affecting interstate commerce. Under the findings of the trial court, the controversy in this case does not involve a labor dispute, an unfair labor practice, or an activity of the employees for the purpose of mutual aid and protection. Any labor objective present was incidental to the accomplishment of respondents' primary purpose, which was to eliminate appellant's competition with other produce dealers. If the Union had agreed to forbid its members to work for appellant, in order to effect the purpose of the combination under consideration, the nonapplicability of the Labor Management Relations Act would be unquestioned. The method used to effect such purpose, by demanding a prohibitive wage rate, calling a strike, and invoking a picket line, while

more subtle, although no less effective, did not change the fundamental nature of the transaction. Likewise, if the Lewis company had acquiesced in the Union's demand, accepted the higher wage scale, determined that the venture was unprofitable, went out of business, and then sued for damages, no labor dispute, unfair labor practice, or mutual aid and protection activity would be an issue in such an action. These examples are used merely to point up the primary purpose of the conduct in question, which was to prevent competition, not to obtain a higher wage scale.

The numerous arguments advanced by respondent Union categorize the charges made against it within well defined unfair labor practices; relate facets of the negotiations and the contentions between it and the Ride-out and Lewis companies to acceptable definitions of a labor dispute; advance investigative and administrative reasons for placing exclusive jurisdiction over these matters in the National Labor Relations Board; and urge that employees are given rights by section 7 of the Labor Management Relations Act which should not be taken from them in an action such as the one at law. (29 U. S. C. Sec. 157.) In each instance, these arguments omit any consideration of the trial court's finding that the activities in question were engaged in "pursuant to" an agreement prohibited by the Cartwright Act, "in furtherance thereof", and "for the purpose" of eliminating appellant as a competitor of respondent dealers.

The Labor Management Relations Act neither prohibits nor protects the activity of a union in aiding and abetting a non-labor group to destroy its competitor. (See generally Weber v. Anheuser-Busch, 348 U. S.

468, 75 S. Ct. 480.)

The combination between respondents was not protected by the exclusionary provisions of the federal antitrust laws which apply to a union engaged in labor activities; nor was the Union, by federal law, "guaranteed" the right to strike to effect the purpose of that combination. (Allen Bradley Co. v. Local Union No. 3, 325 U. S. 797, 807, 65 S. Ct. 1533, 1539; United States v. Hutcheson, 312 U. S. 219, 232, 61 S. Ct. 463, 466.)

In Allen Bradley Co. v. Local Union No. 3, supra, 325 U. S. 797, 808, 65 S. Ct. 1533, 1539, the court said that ". . . Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services."

Consequently, when a union combines with a non-labor group in restraint of trade its activities are subject to the same federal antitrust laws as are those of the non-labor group, even though in so doing, its purpose is to further the interest of their members as wage earners. (Allen Bradley v. Local Union No. 3, supra, 325 U. S. 797, 65 S. Ct. 1533; United Brotherhood, Etc. v. United States, 330 U. S. 395, 400, 67 S. Ct. 775, 778; Las Vegas Merchant Plumbers Ass'n. v. United States, 210 F. 2d 732, 751.)

The trial court's conclusion of law that "the right to strike is guaranteed to defendant labor union", undoubtedly refers to the statutory expression of the anti-injunction policy of the federal government concerning strikes contained in the Clayton, and Norris-LaGuardia

Acts (29 U. S. C. Secs. 52, 101, 104), or the "right which Congress had guaranteed under section 7 of the Taft-Hartley Act -- the right to strike peacefully to enforce union demands for wages, hours and working conditions." (Weber v. Anheuser-Busch, supra, 348 U. S. 468, 475, 75 S. Ct. 480, 485.) As heretofore noted, the activity protected by this legislation does not extend to combinations between labor and non-labor groups in restraint of trade.

The National Labor Relations Act does not guarantee a right to strike. The provisions of this statute simply direct that nothing therein contained "except as specifically provided for herein, shall be construed as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." (29 U. S. C. Sec. 163.)

It is our conclusion that the Union's conduct in question was not a subject of federal legislation; the state law governs; and the determination of the trial court to the contrary was error.

Nothing in this opinion should be taken as indicating that the trial court had jurisdiction to enjoin the respondent union from calling a strike or invoking a picket line for the primary purpose of attaining a lawful labor objective, as distinguished from calling such strike or enjoining such picket line for the primary purpose of effecting the unlawful agreement between it and respondent dealers to destroy competition. Caution must be exercised in defining the scope of any such injunction. (Park & T. Import Corp. v. International Etc. of Teamsters, 27 Cal. 2d 599, 607; O'Shea v. Tile Layers Union, supra, 155 Cal. App. 2d 373, 378.)

Besides contending that the case at bar is one concerning a labor activity subject to the exclusive jurisdiction of the National Labor Relations Board, it also is contended that the federal government has pre-empted the field of legislation respecting transactions involving restraints on trade in interstate commerce; that the Sherman Anti-Trust Act, 15 U. S. C. 1 et seq; Clayton Act, 15 U. S. C. 12 et seq; and Federal Trade Commission Act, 15 U. S. C. 41 et seq. are controlling; and that any relief thereunder must be sought in the federal courts or other federal agency. The federal acts in question together implement a policy against restraints on trade.

The record discloses that although appellant's grocery business involved interstate commerce, consisting in the operation of grocery stores in several states, the only produce business it operated was in San Diego. Whether the activities under consideration in this case occurred in or substantially affected interstate commerce was a question of fact not covered by the general finding that appellant "is engaged in interstate commerce". Even though a company is engaged in interstate commerce, a particular activity or part of its business may be intrastate in character, not occurring in or substantially affecting commerce within the realm of the federal antitrust laws. (United States v. South Eastern Underwriters Assn., 322 U. S. 533, 548, 64 S. Ct. 1162, 1171; Chas. H. Benton, Inc. v. Painters Union, 45 Cal. 2d 677, 682-683.) See also Las Vegas Merchant Plumbers Ass'n. v. United States, supra, 210 F. 2d 732. However, for the purposes of this discussion it will be assumed that the activities in question are within the sphere of the commerce clause of the federal constitution.

The fact that Congress has acted to prevent restraints on trade in interstate commerce, of itself, does not invalidate legislation by a state effecting substantially the same result. The fundamental inquiry in such instances is whether the state legislation is in conflict with national policy. (People of the State of California v. Zook, 336 U. S. 725, 729, 69 S. Ct. 841, 843.)

In Speegle v. Board of Fire Underwriters, supra, 29 Cal. 2d 34, 49-50, the application of the Cartwright Act to interstate insurance transactions was sustained. The court said, page 51:

> "The fact that the Sherman Act is applicable to such practices (i. e. restraints of competition involving boycott, coercion or intimidation) does not mean that the state law concerning restraints of commerce in the insurance field is invalidated as to such activities and agreements involving such practices. . . . Since there is no conflict between the law of this state and the Sherman Act, plaintiff may invoke the state law even if interstate commerce is involved."

The opinion in the foregoing case refers to a general rule expressed by the Supreme Court of the United States that " 'State laws are not invalid under the Commerce Clause unless they actually discriminate against interstate commerce or conflict with a regulation enacted by Congress.' " (Speegle v. Board of Fire Underwriters, supra, 39 Cal. 2d 34, 50.)

In the field of labor management relations affecting

interstate commerce, although congressional action has pre-empted the jurisdiction of a state court "to grant equitable relief in the solution of labor disputes", it has not foreclosed such a court "from asserting jurisdiction in an action for damages resulting from the tortious conduct of those engaged in the dispute." (Garmon v. San Diego Bldg. Trades Council, supra, 49 Cal. 2d 595, 602; San Diego Bldg. Trades Council v. Garmon, supra, 353 U. S. 26, 77 S. Ct. 607.) In Weber v. Anheuser-Busch, Inc., supra, 348 U. S. 468, 476, 75 S. Ct. 480, 486, the Supreme Court refers to a number of instances where the courts held that the federal enactments had not exclusively absorbed the authority of the State with respect to labor activities.

"In those cases where the Supreme Court has held that exclusive jurisdiction is vested in the National Labor Relations Board it appears without question that the basis of the decisions is the desirability of avoiding such a conflict between state and federal policies and procedural remedies as would result in an interference with uniform enforcement of federal act." (Garmon v. San Diego Bldg. Trades Council, supra, 49 Cal. 2d 595, 603.) No need for federal legislation appears in order to effect uniformity of policy or enforcement thereof against restraints on trade.

The validity of a state statute regulating interstate transportation, containing provisions substantially the same as those of a federal act, was upheld by the Supreme Court of the United States, even though the conduct prohibited by such laws might be punishable as an offense against both the federal and state governments. (People of the State of California v. Zook, supra, 336 U. S. 725, 69 S. Ct. 841.) The court said (page 730):

> "If state laws on commerce are identical with those of Congress, the court may find congressional motive to exclude the States . . . But the fact of identity does not mean the automatic invalidity of State measures. Coincidence is only one factor in a complicated pattern of facts guiding us to congressional intent."

-and further, (page 733)

> "The question is whether Congress intended to override State laws identical with its own when it, through the Interstate Commerce Commission, regulated share-expense passenger automobile transportation, or whether it intended to let State laws stand. While the statute says nothing expressly on this point and we are aided by no legislative history directly in point, we know that normally congressional purpose to displace local laws must be clearly manifested. (Citing cases.)"

"The Cartwright Act merely articulates in greater detail a public policy against restraint of trade that has long been recognized at common law." (Speegle v. Board of Fire Underwriters, supra, 29 Cal. 2d 34, 44.) Such a legislative enactment is within the tradition of the "usual police powers" of the state, referred to in the Zook case as an aid in determining congressional intent. (People of the State of California v. Zook, supra, 336 U. S. 725, 734, 69 S. Ct. 841, 846.) The Act is not in conflict with federal policy or law. To the contrary, in this area, the objective of each entity of

government is the same. The state seeks to protect its citizens and the national government seeks to protect interstate commerce from a long recognized unlawful activity.

In Parker v. Brown, 317 U.S. 341, 367, 63 S. Ct. 307, 321, the validity of the California Agricultural Prorate Act was under consideration. The program sponsored by the act "was not aimed at nor did it discriminate against interstate commerce, although it undoubtedly affected the commerce by increasing the interstate price of raisins and curtailing interstate shipments to some undetermined extent." The court said (page 368):

> "It thus appears that whatever effect the operation of the California program may have on interstate commerce, it is one which has been the policy of Congress to aid and encourage through federal agencies . . . Hence we cannot say that the effect of the state program in interstate commerce is one which conflicts with congressional policy or is such as to preclude the state from this exercise of its reserved power to regulate domestic agricultural production."

Although the court was not considering a situation where similar legislation had been enacted by Congress, the principles advanced in considering the validity of the state statute, even though it affected interstate commerce, are pertinent to a consideration of the factual situation at bar.

As there is no conflict between the state and federal policies encompassed by the legislation under consideration; no conflict between the state and federal acts; no need for a single statute to effect uniformity of policy or procedure; the local law is within the tradition of "the usual police powers" of the state; and Congress has not indicated its intent to pre-empt the field, it is our opinion that the Cartwright Act may be applied to the situation at bar in the state courts.

Respondent union has made various contentions concerning the lack of findings with respect to alleged material facts. These come within the rule heretofore noted, that claims of error affecting parties who have not appealed will not be reviewed. Upon a retrial of the issues in this case the trial court may consider these contentions according to the law and the facts in the premises.

The judgment is reversed and the case is remanded for a new trial.

COUGHLIN
J. Pro Tem.

WE CONCUR:

GRIFFIN
P. J.

MUSSELL
J.

APPENDIX "C"

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA, IN AND FOR
THE COUNTY OF SAN DIEGO

ALFRED M. LEWIS, INC., a corporation, et al.,	)	No. 213850
Plaintiffs,	)	MEMORANDUM OPINION
vs.	)	
WAREHOUSEMENS, TEAMSTERS, CHAUFFEURS, AND HELPERS LOCAL UNION NO. 542, an unincorporated Association, et al.,	)	
Defendants.	)	

On the conflicting evidence, I shall find in favor of the plaintiff Alfred M. Lewis, Inc., and against the defendants on the issue of liability.

I have been greatly concerned with the contention of the Union that in view of the decision of the United States Supreme Court in Garmon II, the law is such at the present time as to prevent a successful prosecution of this action. There are many statements in the opinion of Justice Frankfurter to support the contention. However, all things considered, I am of the opinion that this court does have jurisdiction of the action, and I shall so hold.

If no proceedings are to be taken before a higher court to test the jurisdiction of this court to try the remaining issue, I can undertake that at almost any time after June 10, 1962.

Dated: May 17, 1962.

CLARENCE HARDEN
Judge of the Superior Court

APPENDIX "D"

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE
COUNTY OF SAN DIEGO

WAREHOUSEMENS, TEAMSTERS, CHAUFFEURS & HELPERS LOCAL UNION NO. 542,	)	
	)	4 Civil
vs.	)	No. 6971
	)	
SUPERIOR COURT ETC.	)	
	)	

BY THE COURT:

The Petition for Writ of Prohibition or Certiorari is denied.

(COPY)

DATED July 13, 1962

Griffin, P. J.

cc: Wencke, Carlson & Kuykendall-S. D.
Hillyer, Crake & Irwin-S. D.

APPENDIX "E"

CLERK'S OFFICE, SUPREME COURT
STATE BUILDING

San Francisco, California

Aug 8 - 1962

Dear Sir: I have this day filed Order ...

HEARING DENIED

In re: 4 Civ No. 6971-6972

Warehousemen's, Teamsters e

vs.

Superior Ct (San Diego)

Respectfully

WILLIAM L. SULLIVAN

Clerk

APPENDIX "F"

National Labor Relations Act, 49 Stat. 449, 29 U. S. C. section 151, approved July 5, 1935; as amended by the Labor Management Relations Act, 1947 (Taft-Hartley), 61 Stat. 136, 29 U. S. C. section 141, passed over Presidential veto on June 23, 1947.* Citation in pertinent part:

Section 2, subsection (5): "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

Section 2, subsection (9): "The term 'labor dispute' includes any controversy concerning terms, tenure or condition of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

"Rights of Employees

"Sec. 7. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives

* The amendments to the Act by the Labor Management Reporting and Disclosure Act of 1959, 29 U. S. C. §401, have been omitted inasmuch as they postdated this dispute.

of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

"Unfair Labor Practices

"Sec. 8(a) It shall be an unfair labor practice for an employer--

> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . ."
>
> "(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

"(b) It shall be an unfair labor practice for a labor organization or its agents--

> "(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7; . . . or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances; . . .
>
> "(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the

provisions of section 9(a);

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike . . . where an object thereof is ---

"(A) forcing or requiring . . . any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . ."

"Sec. 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . .

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: . . .

"(c) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists

shall provide for an appropriate hearing upon due notice. . . ."

"Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. . . ."

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FILED
MAR 1 1963
JOHN F. DAVIS, CLERK

No. 722

In The Supreme Court of The United States

October Term, 1962

WAREHOUSEMEN, TEAMSTERS, CHAUFFEURS & HELPERS LOCAL UNION NO. 542,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorney for ALFRED M. LEWIS, INC., Respondent, Real Party in Interest

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Of Counsel.
726 Bank of America Bldg.
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SUBJECT INDEX

I QUESTION PRESENTED BY THE PETITION . . . . . .

H STATEMENT OF THE CASE . . . . . .

III ARGUMENT . . . . . .

A. THERE IS NO JURISDICTION TO GRANT THE WRIT SOUGHT . . . . .

B. IF JURISDICTION TO GRANT THE PETITION EXISTS, IT SHOULD BE DENIED AS A MATTER OF DISCRETION . . . . . .

C. PETITIONER HAS NOT PROPERLY PRESERVED THE FEDERAL QUESTION IT NOW RAISES . . . . . .

D. THE PETITION IS WITHOUT MERIT UNDER THE LAW . . . . . .

IV CONCLUSIONS . . . . . .

TABLE OF AUTHORITIES CITED

Page

CASES

Alfred M. Lewis, Inc. v. Warehousemens Local 542, 163 Cal. App. 2d 771, 330 P. 2d 53 (1958) 2, 9, 10

Allen-Bradley Co. v. Local Union No. 3 IBEW, 325 U.S. 797 (1945) 7, 12, 13

Alpha Beta Food Markets, Inc. v. Amalgamated Meat Cutters, 147 Cal. App. 2d 343, 305 P. 2d 163 (1956) 14

Association of Orchestra Leaders v. Musicians Local 77, 203 F. Supp. 755 (E.D. Pa. 1962) 15

Building Contractors Assn. v. Gugliemelli, 22 CCH Lab. Cas., Par. 67065 (N.Y. Supreme Court, N.Y. County Special Term, Part III, 1952) 14

Commonwealth v. McHugh, 326 Mass. 249, 93 N.E. 2d 751 (1950) 14, 16

Cuyahoga Plastering Contractors Assn. v. Lennox Halderman Co., 39 CCH Lab. Cas., Par 66265 (N.D. Ohio 1960) 15

TABLE OF AUTHORITIES CITED (Cont'd.)

Page

CASES

De Lao v. Superior Court, 37 Cal. 2d 711, 234 P. 2d 961 (1951) 6

East Texas Motor Freight Lines v. Teamsters Union, 163 Fed. 2d 10, (5th Cir. 1947) 13

Electrical Workers v. U.S., 219 Fed. 2d 431 (6th Cir. 1955) cert. denied, 349 U.S. 917 (1955) . . . 13

Gibony v. Empire Storage and Ice, 336 U.S. 490 (1949) 7, 14

Gore v. Bingaman, 20 Cal. 2d 118, 124 P. 2d 17 (1942) 8

Heavy High Bldg. Constr. Teamsters v. Superior Court, 203 Adv. Cal. App. 665, 21 Cal. Rptr. 840 (1962) . . 11

Herndon v. Georgia, 295 U.S. 441 (1935) . . 9

Illinois Central R.R. v. State P.U.C. of Ill., 245 U.S. 493, 510 (1918) 17

Ivory v. Superior Court, 12 Cal. 2d 455, 85 P. 2d 894 (1938) . . 6

Jewell Tea Co. v. Meat Cutters, 274 F. 2d 217 (7th Cir. 1960) 14

TABLE OF AUTHORITIES CITED (Cont'd.)

Page

CASES

Kold Kist v. Amalgamated Meat Cutters, 99 Cal. App. 2d 191, 221 P. 2d 724 (1950) 14

Lewis v. Pennington, 38 CCH Lab. Cas., Par. 65747 (E.D. Tenn. 1959) 15

Local No. 24, International Brotherhood of Teamsters v. Oliver, 358 U.S. 283 (1959) 9, 10, 11 12, 14, 15

Los Angeles Meat Drivers Local 626 v. U.S., 368 U.S. 965 (1962) 15

Messner v. Journeymens Barbers etc. International Union, 58 Cal. 2d 873, 351 P. 2d 347 9

N.Y. Central Ry. v. N.Y. Penn Co., 271 U.S. 124 (1926) 9

Parker v. Illinois, 333 U.S. 571 (1948) . . . 5

Pellett v. Sonotone Corp., 26 Cal. 2d 705, 160 P. 2d 783 (1945) 8

Radio Officers v. N.L.R.B., 347 U.S. 17 (1954) 12

TABLE OF AUTHORITIES CITED (Cont'd.)

Page

CASES

Red Owl Stores v. Amalgamated Meat Cutters, 109 F. Supp 629 (D. Minn. 1953) 14

Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1948) 5

Rescue Army v. Municipal Court, 331 U.S. 549 (1947) 6

Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69 (1946) 6

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 9

Streiffer v. Seafarers Sea Chest Corp., 162 F. Supp. 602 (E.D. La. 1958) . . . 15

U.S. v. Employing Plasterers Association, 347 U.S. 186 (1954) . . . 13

United States v. Hutcheson, 312 U.S. 219, 232 (1941) 13

United States v. Womens Sportswear Manufacturers Association, 336 U.S. 460, 464 (1949) 13

Weber v. Anheuser-Busch, 348 U.S. 468 (1954) 13

TABLE OF AUTHORITIES CITED (Cont'd.)

Page

CODES

Calif. Code of Civ. Proc. Sec. 1067 6
Sec. 1068 6
Sec. 1102 6
Sec. 1103 6

STATUTES

28 U.S.C. Sec. 1257 5

29 U.S.C. Sec. 158(b)(2)
National Labor Relations Act,
Section 8(b)(2) 10

29 U.S.C. Sec. 160(b)
National Labor Relations Act 310(b) . . . 12

OTHER AUTHORITIES

Hearing Before the Senate Committee
on the Judiciary, 87th Cong.,
1st Sess. 18 (1961) 16

No. 722

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1962

WAREHOUSEMEN, TEAMSTERS, CHAUFFEURS & HELPERS LOCAL UNION NO. 542,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

QUESTION PRESENTED BY THE PETITION

The Real Party in Interest, ALFRED M. LEWIS, INC., hereinafter referred to as LEWIS for clarity, contends Petitioner has misstated the questions presented. Only one question is present if this Honorable Court feels the petition should be allowed. The question is:

> "Does a State Court have jurisdiction to grant damages to a party injured by a tortious conspiracy of employer and labor groups which has destroyed said party's business in violation of the State's Anti Trust Statutes?"

II.

STATEMENT OF THE CASE

Petitioner's statement of the case is misleading and alleges the existence of facts totally unsupported by any evidence or even pleadings at any state of the lengthy litigation of this matter. The statement of facts in the decision of the California District Court of Appeal, at 163 Cal. App. 2d 771; 330 P. 2d 53 (1958) when compared to petitioner's allegations makes this clear.

In May, 1956, LEWIS established a wholesale produce business in San Diego. It was LEWIS' first and only produce operation. It was totally divorced from LEWIS' wholesale business in dry groceries, both as to location and personnel. Rideout possessed modern

loading and storage facilities long before LEWIS entered the picture and this was never raised as a factor by petitioner until LEWIS started its business.

Two separate trial courts have found that neither LEWIS or Rideout had "captive accounts", or "semi-captive accounts" or were in any other way comparable to the Safeway Stores' operation. On the contrary, the trial courts have found that the "semi-captive account" argument was a false front asserted by petitioner and the conspiring employers to try to mask their nefarious agreement.

Contrary to petitioner's claim of divorcing a segment of its membership working for LEWIS and Rideout from the segment working for other produce dealers, there was no such division until LEWIS entered upon the scene, although Rideout for many months had enjoyed the alleged advantages over his competitors which purportedly required a change in his status in May, 1956.

At the second trial further evidence added to the proof of the conspiracy and its total lack of any legitimate labor objective. From May of 1956 through the end of the strike in 1957, a number of contacts between officers of petitioner and the head of the defendant employers group were disclosed by the diary of the individual head of the employers group. The diary indicated the employers group was kept advised by petitioner's officers of union meetings, the meeting place, time and the results of votes taken on striking LEWIS and Rideout. These communications of petitioner to the conspiring employers related to petitioner's demands and actions toward LEWIS' and Rideout's alleged "segment" of ptitioner's employees and not the "divorced segment"

working for the defendant employers.

Additional evidence also disclosed that at the end of the strike around April 25, 1957, LEWIS had totally closed down his produce business and withdrawn from the scene. When this happened, petitioner, through its officers and attorney, told Rideout he could return to work at the lower wage rate granted the defendant employers, provided he agreed to: (1) Dismiss his damage and injunction suit against petitioner and defendant employers; and (2) agreed not to associate in any form or manner with LEWIS and not to let LEWIS use his facilities for a produce business by way of lease, joint venture or any other scheme. Petitioner also offered Rideout a contract on the same wage basis as defendant employers with the additional written provision that if Rideout ever associated in any way with any firm engaged in the produce business which was also engaged in any manner in the grocery business, then Rideout's wages would be at the higher rate of Safeway Stores. The only entity which would fit the contractual category which could impose on Rideout the discriminatory wage rate was Lewis.

After accepting petitioner's demands, Rideout went back into business but could not recover from the financial loss suffered in the strike. Finally some months later Rideout sold his business to a group of retail grocers who formed a new venture. Although Rideout's business was now owned by retail grocers selling produce to their retail outlets, i.e., "captive accounts", none of the events which met LEWIS' entry into the produce business recurred.

III.

ARGUMENT

A. THERE IS NO JURISDICTION TO GRANT THE WRIT SOUGHT

Jurisdiction to grant the writ sought depends upon the finality of the decision below within the meaning of 28 U.S.C. Sec. 1257.

Petitioner seeks to review a decision of a trial court of general jurisdiction finding petitioner liable for violation of State anti-trust acts before the lower court decides if any damages have been suffered by Lewis, before it makes findings of fact, before it has purported to decide any of the issues posed by the second and third questions in the petition, and before it has made any final decision or judgment.

The claim by petitioner that review should not await the normal procedure of judgment and the appellate system of the state courts is unsound from a practical viewpoint and contrary to law.

Petitioner's theory that the test of finality is met because liability has been decided and all that remains is to award damages is unsound, Republic National Gas Co. v. Oklahoma, 334 U.S. 62 (1948). A judgment of a state appellate court is not final unless it ends the litigation by fully determining the rights of the parties, leaving to the trial court only the ministerial function of entering the directed judgment (Parker v. Illinois, 333 U.S. 571 (1948)).

Petitioner's argument of finality rests on an assertion that the denial of its petitions for writs of

certiorari or prohibition in the state appellate courts are final under the doctrine of Rescue Army v. Municipal Court, 331 U.S. 549 (1947). That case requires that the denial of the petition by the state courts involved a determination of a federal question and that it does not rest on an adequate state ground alone. Since the denial of petitioner's requested relief by the District Court of Appeal and Supreme Court of California were without opinion, there is no basis for saying that the denial involved a decision on a federal question.

It is proper to examine California law to determine if its decision was final in the appellate courts, Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69 (1946).

California allows a writ of review where an inferior judicial tribunal has exceeded its jurisdiction and there is no appeal, or, in the judgment of the court, there is no plain, speedy, and adequate remedy, Calif. Code of Civ. Proc. Sec. 1068. A writ of review may be denominated a writ of certiorari, Calif. Code of Civ. Proc. Sec. 1067. A writ of prohibition will issue for the same purpose and on the same conditions, Calif. Code of Civ. Proc. Secs. 1102, 1103.

Where the ruling sought to be reviewed is not appealable, certiorari will not lie if petitioner has an adequate remedy by appeal from a subsequent judgment or order, DeLao v. Superior Court, 37 Cal. 2d 711, 234 P. 2d 961 (1951); Ivory v. Superior Court, 12 Cal. 2d 455, 85 P. 2d 894 (1938). Since appeal from a subsequent judgment of the trial court is available in this case and the trial court's memorandum decision is non-appealable, the state appellate courts could clearly

have denied petitioner the relief sought on state law alone without regard to deciding any federal question.

B. IF JURISDICTION TO GRANT THE PETITION EXISTS, IT SHOULD BE DENIED AS A MATTER OF DISCRETION.

Considerations for granting certiorari are not present even if jurisdiction to grant the writ is present. The state courts of California have not decided a substantial federal question not determined by the United States Supreme Court, nor have they made a decision not in accord with decisions of the United States Supreme Court.

Assuming the decision of the state court sought to be reviewed decides a federal question, it of necessity would be in accord with Allen-Bradley Co. v. Local Union No. 3 IBEW, 325 U.S. 797 (1945) and Gibony v. Empire Storage and Ice, 336 U.S. 490 (1949). The state court decision at most could hold that a union is not immune from anti-trust laws where it combines with non-labor groups for a purpose lacking a legitimate labor objective.

To grant certiorari is to conclude at this time that the trial court and appellate court of the state would, in the future, allow a final judgment contrary to the laws of California and the United States.

Petitioner's argument that denial of review at this state will hamper petitioner's legitimate activities pending final determination is absurd. The assertion is pure speculation unsupported by evidence at any time. Petitioner's own actions deny the claim. Petitioner

chose to abandon review of the decision of the District Court of Appeal in 1957. Petitioner preferred to retry the issue of liability a second time to see which way the wind was blowing before seeking any writ on jurisdictional grounds. After seeking a writ, petitioner has availed itself at each stage of the appellate procedure, including its petition to this Court, of the maximum time allowed including extensions where available. Such conduct belies the claim that this litigation interferes with petitioner's legal objectives.

C. PETITIONER HAS NOT PROPERLY PRESERVED THE FEDERAL QUESTION IT NOW RAISES.

Under the law of California, the doctrine of "law of the case" applies to any question as to the sufficiency of the evidence to support the second trial court's finding of a conspiracy by petitioner with employers to destroy LEWIS, Pellett v. Sonotone Corp., 26 Cal. 2d 705, 160 P. 2d 783 (1945). The only question not foreclosed by "law of the case" is the issue of jurisdiction.

If petitioner considered the ruling by the state appellate court on the appeal after the first trial court decision erroneous on the issue of jurisdiction, petitioner could have and should have applied to the California Supreme Court for a hearing, Gore v. Bingaman, 20 Cal. 2d 118, 124 P. 2d 17 (1942). If a hearing was denied, or if granted and unfavorable to petitioner, petitioner could have applied to this Court years ago for certiorari. However, petitioner preferred to let an appellate decision become final and retry the case.

The burden was and is on petitioner to preserve a

federal question as the settled rules of state practice required, Herndon v. Georgia, 295 U.S. 441 (1935); N.Y. Central Ry. v. N.Y. Penn. Co., 271 U.S. 124 (1926).

Petitioner, having failed to preserve the federal question of preemption by availing itself of its remedies in higher courts after the first appeal, should not now be heard to plead for a writ on that issue in the middle of a second trial before judgment.

D. THE PETITION IS WITHOUT MERIT UNDER THE LAW.

The contention of petitioner is built solely around the claim that the decision of the United States Supreme Court in San Diego Building Trades Council vs. Garmon, 359 U.S. 236 (1959) which was decided after the appeal above mentioned in this particular case, has changed the law as to jurisdiction of a state over the type of activity involved. Petitioner cites no cases of the federal courts or of any state courts which overrule, reverse, or criticize the decision in Alfred M. Lewis, Inc. vs. Warehousemens, Local 542, 163 Cal. App. 2d 771, 330 P. 2d 53 (1958), nor do they contend there are any cases which impliedly criticize the decision.

Since the decision of the Garmon II case, relied upon by petitioners, the decision in Alfred M. Lewis, Inc. v. Warehousemen, Local No. 542, supra, has been cited by the California Supreme Court in Messner v. Journeymens Barbers etc. International Union, 53 Cal. 2d 873, at page 886, 351 P. 2d 347, at page 356 (1960). It should be noted that the Messner decision particularly made reference to Local No. 24, International Brotherhood of Teamsters vs. Oliver, 358 U.S. 283 (1959),

which is a decision relied upon by petitioner in its claim that there is no jurisdiction in the State Court to entertain plaintiff's action.

The decision in San Diego Building Trades Council vs. Garmon, supra, involved a matter in which the court had specifically found the conduct of the Union was an unfair practice under Section 8(b)(2) of the National Labor Relations Act, 29 U.S.C. Sec. 158(b)(2), and the state court had held the Union's conduct constituted a tortious activity based on an unfair labor practice under the laws of the State of California. The Garmon case involved a pure question of Labor Law involving a Union and had nothing to do with anti-trust acts or their application to a conspiracy between a Union and employers to stifle competition.

The petitioner relies on Local No. 24 of the International Brotherhood of Teamsters etc. vs. Oliver, 358 U.S. 283 (1959). Its reliance on this case is unjustified. The court in that case pointed out the facts involved wage and not price fixing. It was specifically stated in that decision at page 286;

> "No claim is made that Article XXXII (the Article of the contract which the state court contended violated its anti-trust laws) violates any provision of Federal Law."

It is further stated in the Oliver decision, at Page 296:

> "Federal Law sets some outside limits (not contended to be exceeded here) on what their agreement may provide. Allen-Bradley Co. v. Local Union No. 3, IBW,

325 U.S. 797."

Heavy High Bldg. Constr. Teamsters vs. Superior Court, 203 Adv. Cal. App. 665, 21 Cal. Rptr. 840 (1962) is identical to the Oliver case and recognizes the same limitations on Union conduct in combining with employer groups.

Petitioner's position is merely that because petitioner is a union, its conduct must, as a matter of law, be "arguably" within the jurisdiction of the National Labor Relations Board, because it is so "argued" by petitioner. This ignores the finding by two trial courts that petitioner was engaged in price fixing and not wage fixing. It further ignores the finding that petitioner's acts were totally lacking in any legitimate labor purpose. It even ignores that its acts were in concert with non-labor groups who do not seek relief in this Court.

The fallacy of petitioner's position is that it denies the right of a trial court to ever decide if a Union's conduct is not "arguably" within the jurisdiction of the National Labor Relations Board. It denies the right of a trial court to decide that a Union's conduct lacks a legitimate labor objective. It claims this function is denied a trial court because a Union merely pleads its status and claims its conduct is "arguably" within the jurisdiction of the National Labor Relations Board.

Petitioner further ignores the fact that when the amended complaint was filed before the second trial LEWIS was out of business. Thus LEWIS, vis-a-vis petitioner, had no relationship at all, except a tort claim for damages inflicted years before. Petitioner also ignores the fact that no relief was open to LEWIS

in the National Labor Relations Board under any theory since the Board's jurisdiction over any conduct of petitioner in 1956 or 1957 was barred by the Board's six months limitation on filing unfair practice charges, N. L. R. A. 310(b), 29 U.S.C. Sec. 160(b); Radio Officers v. N. L. R. B. 347 U.S. 17 (1954).

As previously determined in the LEWIS appeal, the conduct complained of here is a violation of the United States Anti-Trust Laws, as well as the State Anti-Trust Act. Yet in the Oliver case the Court was careful to point out that the provisions of a contract attacked by the State of Ohio as a violation of its Anti-Trust Act did not violate any provisions of the Federal Anti-Trust Law. Further, the Court's recognition that Federal Law sets an outside limit on the type of conduct of the Union, as set forth in the Allen-Bradley case, cited in the opinion, is a clear recognition that the type of conduct complained of by LEWIS continues to be outside the application of the Federal Labor Act for purposes of preemption.

Starting with the Allen-Bradley case, a long line of decisions have held that a Union can seek no shelter of immunity under the Federal Labor Acts where it is guilty of combining with employer groups to violate Anti-Trust acts. This Court stated in Allen-Bradley Co. v. Local Union No. 3 IBW, 325 U.S. 797, 808 (1945):

> "Without regard to these cases, however, we think Congress never intended that Unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control

the marketing of goods and services."

There is not the slightest implication in any decision of this Court since the Allen-Bradley case to indicate that the Court has ever intended to confer immunity on Unions conspiring with employers to stifle competition in violation of Anti-Trust Acts. Previous to the Allen-Bradley case, this Court has indicated in United States v. Hutcheson, 312 U.S. 219, 232 (1941) as follows:

> "There was no violation of anti-trust laws so long as a 'Union acts in its self-interest and does not combine with non-labor groups'."

The decision of this Court in the Bradley case has been consistently followed in the Federal Courts. U.S. v. Employing Plasterers Association, 347 U.S. 186 (1954); Electrical Workers v. U.S., 219 Fed. 2d 431 (6th Cir. 1955) cert. denied, 349 U.S. 917 (1955); East Texas Motor Freight Lines v. Teamsters Union, 163 Fed. 2d 10 (5th Cir. 1947).

In United States v. Womens Sportswear Manufacturers Association, 336 U.S. 460, 464 (1949), this Court gave a full answer to the claim of petitioner herein as follows:

> "Benefits to Unions cannot be used 'as a cat's paw' to pull the employers' chestnuts out of the anti-trust fires."

All of the decisions relied upon by petitioner constitute nothing more than a restatement of the decision in Weber v. Anheuser-Busch, 348 U.S. 468 (1954).

which made clear that states could not interfere in the field of Federal Labor legislation under the guise of doing so through anti-trust laws. However, as pointed out by the decision in the first LEWIS appeal, that was not the problem involved in this case. The problem here comes squarely within the rule of Gibony v. Empire Storage and Ice, 336 U.S. 490 (1949).

Many cases on the issue of labor union immunity from anti-trust acts have been decided contrary to petitioner's position both before and after the Oliver case:

Union reliance on the case of Teamsters v. Oliver, supra, was rejected where a Union combined with employers to restrict marketing hours by contract, Jewell Tea Co. v. Meat Cutters, 274 F.2d 217 (7th Cir. 1960). A Federal Court has entertained a suit charging unions and employers with conspiracy to violate State Anti-Trust Laws, Red Owl Stores v. Amalgamated Meat Cutters, 109 F. Supp. 629 (D. Minn. 1953). See also, Alpha Beta Food Markets, Inc. v. Amalgamated Meat Cutters, 147 Cal. App. 2d 343, 305 P.2d 163 (1956); Kold Kist v. Amalgamated Meat Cutters, 99 Cal. App. 2d 191, 221 P.2d 724, (1950).

Other states have applied their anti-trust acts to labor management combinations in the face of pre-emption claims by Unions; Commonwealth v. McHugh, 326 Mass. 249, 93 N.E.2d 751 (1950); Building Contractors Assn. v. Gugliemelli, 22 CCH Lab. Cas., Par. 67065 (N.Y. Supreme Court, N.Y. County Special Term, Part III, 1952). (Conspiracy by Union and employers to violate federal and state anti-trust laws by refusal of Union to enter into contract with plaintiff on terms as favorable as extended to defendant employers).

Since the decision of Teamsters v. Oliver, supra, the following cases are noteworthy, although ignored by petitioner:

A union was denied immunity under its right of collective bargaining and also under the Norris-La Guardia and Sherman Acts where it conspired to make labor available to one group of employers under preferential conditions in order to restrain competition of another group of employers, Cuyahoga Plastering Contractors Assn. v. Lennox Halderman Co., 39 CCH Lab. Cas., Par. 66265 (N.D. Ohio 1960).

A complaint, charging a Union with conspiring with employers to raise wages to a point complainant couldn't afford, alleged a violation of federal anti-trust laws and the union was not immune Lewis v. Pennington 38 CCH Lab. Cas., Par. 65747 (E.D. Tenn. 1959).

Other recent cases on the subject have denied Union claims of immunity from anti-trust laws by reason of their labor position, Los Angeles Meat Drivers Local 626 v. U.S., 368 U.S. 965 (1962), Streiffer v. Seafarers Sea Chest Corp., 162 F. Supp. 602 (E.D. La. 1958), Association of Orchestra Leaders v. Musicians, Local 77, 203 F. Supp. 755 (E.D. Pa. 1962).

The contention of the petitioner is even denied by the authorities of the United States charged with enforcement of anti-trust laws: Lee Loevinger, head of the Anti-Trust Department of the United States Department of Justice, stated before Congress as follows:

> "Where Labor combines with business to impose what are in effect, business

> restraints under the rule of the Allen-Bradley case, it enjoys no immunity and I see no reason why it should have immunity." Hearing before the Senate Committee on the Judiciary, 87th Cong., 1st Sess. 18 (1961).

Petitioner seeks an order of this Court that will deny the State jurisdiction over violations of its laws which existed under common law even prior to the enactment of the statutes in question.

Consideration should be given to the statement of the Court in Commonwealth v. McHugh, 326 Mass. 249, 93 N.E.2d 751 (1950) where the Court said in answer to a Union challenge to its anti-trust laws:

> "A state court should be thoroughly convinced before it abandons jurisdiction over subjects that historically have been within the competence of the state, lest it discovers later that it has retreated where the Federal government will not advance and has therefore been derelict in its duty."

This Court itself has cautioned state courts on the subject:

> "In construing Federal statutes enacted under the power conferred by the commerce clause of the Constitution, the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved

> powers of a state, even where that may be done, unless,and except, so far as, its purpose to do so is clearly manifested."

Illinois Central R.R. v. State P.U.C. of Ill., 245 U.S. 493, 510 (1918).

Petitioner's claim that the state court is deciding labor organization status is spurious. There is no finding or judgment of the state court to this effect. No damages have been awarded. There is nothing to indicate any one will be held liable for damages who is not legally responsible. There is no showing the issue was ever raised below as a Federal question.

IV.

CONCLUSIONS

It is submitted that this Honorable Court should not destroy traditional state jurisdiction on the basis of a claim of petitioner that while it has been caught "red handed" and twice condemned for violating the anti-trust laws of California, it should be excused for destroying the business of LEWIS because one of the conspirators is a labor union.

All of the other issues and references made in the petition on file herein and in the points and authorities and documents filed in support thereof, involve no issue for purposes of the issuance of the writ sought and would properly be directed to the Trial Court. Certainly no presumption is to be indulged in, at this state, that the trial court would not obey the law heretofore

laid down by the legislative and judicial bodies, whose decisions must control its determination based on the evidence before the Trial Court.

Lewis prays that this Honorable Court summarily deny the petition for hearing filed herein, said petition being totally lacking in merit.

Respectfully submitted,

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No. 722

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

WAREHOUSEMEN, TRANSFERMEN, CRAFTSMEN & HELPERS LOCAL NO. 542,
Petitioner,

v.

THE SUPREME COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN DIEGO, ET AL.,
Respondents.

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES CITED

Cases

Page

Alfred M. Lewis, Inc. and Rideout Produce Co. v. Warehousemen, etc. Local Union No. 542, *et al.*, 163 Cal. App.2d 771, 330 P.2d 53 (1958) 1, 2, 5

Allen-Bradley Co. v. Local Union No. 3, IBEW, 325 U.S. 797 (1945) 6, 7

Brown Shoe Co. v. United States, 370 U.S. 394 at 306 (1962) 3

Commonwealth v. Pullis, 3 Commons & Gilmore, A Documentary History of American Industrial Society, 59-248 (1910) 8

Gibony v. Empire Storage and Ice Co., 336 U.S. 490 (1949) 6, 7

Gore v. Bingaman, 20 Cal.2d 118, 124 P.2d 17 (1942) 5

Hammerstein v. Superior Court, 341 U.S. 491 in 1951 ..... 2, 3

Local 24 Teamsters v. Oliver, 358 U.S. 283 (1949), 362 U.S. 605 (1960) 5

Local No. 438, Construction and General Laborers Union *et al.*, v. Curry, 371, U.S. 542 ..... 3, 4

Marine Engineers v. Interlake Steamship Company, 370 U.S. 173 (1962) 4, 5

Mercantile National Bank of Dallas v. Langdeau, Receiver, 371 U.S. 555 ..... 3, 4

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 4, 5, 6

Statutes

Page

Labor Management Relations Act, 29 U.S.C. Section 141 6

National Labor Relations Act, 29 U.S.C. Section 151 7

28 U.S.C. Section 1257 2

Articles

Fanning, "The Duty to Bargain in 1962," 14 Labor Law Journal 18, at 24 8

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Respondents.

PETITIONER'S REPLY BRIEF

I. RESPONDENT INCORRECTLY "RESTATES" THE CASE.

The Real Party in Interest, ALFRED M. LEWIS, INC., hereinafter referred to as "Respondent" for clarity, contends that "Petitioner's statement of the case is misleading and alleges the existence of facts totally unsupported by any evidence or even pleadings at any state of the lengthy litigation of this matter," and cites the decision of the California District Court of Appeal in *Alfred M. Lewis, Inc. and Rideout Produce Co.* v. *Warehousemen, etc. Local Union No. 542*, et al., 163 Cal. App.2d 771, 330 P.2d 53 (1958), as authority for this proposition.

The Petitioner invites reference to the District Court decision

in *Lewis*, reprinted as Appendix "B" to the Petition, filed herein, both in support of its Statement of the Case, and in opposition to the "Restatement" of Respondent.

For example, nowhere in the *Lewis* decision, or elsewhere in the record of this "lengthy litigation," can evidence be found of the general allegations of the second paragraph of Respondent's view of the case.

Nor is there support for Respondent's other major contentions. Neither the *Lewis* decision nor the record supports Respondent's charge that the term "semi-captive account" was found to be a "false front" by either trial court, of by the appellate court.

Respondent's contention with regard to the existence of the segments of the Union is subject to the same criticism.

Respondent's contentions with regard to the evidence of a diary kept by an employer defendant are curious in view of the fact that the motion to produce this document was one in which Petitioner joined; and his conclusions as to the significance of this evidence and the evidence recounted by him in the remaining paragraphs of his view of the case are peculiarly his own, unsupported by the *Lewis* decision or by the court in this record. The court's Memorandum Opinion is reproduced as Appendix "C" to the Petition filed herein.

II. RESPONDENT IGNORES THE TRUE BASES OF THIS COURT'S JURISDICTION:

In arguing against jurisdiction under 28 U.S.C. Section 1257, on which Petitioner relies, the Respondent utilizes only those authorities prior to the decision of this Court in *Hammerstein* v.

Superior Court, 341 U.S. 491 in 1951, and relied on by Petitioner for its holding that this Court does have certiorari jurisdiction from a denial of prohibition.

In confining itself to the law prior to 1951, Respondent likewise fails to recognize the application of the pragmatic standards of *Brown Shoe Co. v. United States*, 370 U.S. 294 at 306 (1962), to the instant case. (Petition, pp. 17-18.)

Nor does Respondent recognize this Court's two most recent decisions on the question of finality under section 1257: *Local No. 438, Construction and General Laborers Union et. al.* v. *Curry*, 371 U.S. 542, and *Mercantile National Bank at Dallas* v. *Langdeau, Receiver*, 371 U.S. 555.

Each of these cases is peculiarly applicable to the instant Petition. Thus, in *Curry* this Court rejected the contention of Respondents that the order appealed from, a temporary injunction, was not 'final' within the meaning of Section 1257, inasmuch as the state court's final judgment and permanent order remained to be issued. However, as this Court there said:

> "The federal question raised by petitioner in the Georgia court, and here, is whether the Georgia courts had power to proceed with and determine this controversy . . . What we do have here is a judgment of the Georgia court finally and erroneously asserting its jurisdiction to deal with a controversy which is beyond its power and instead is within the exclusive domain of the National Labor Relations Board." (at p.548)

As in *Curry*, the federal question raised by Petitioner in the California courts, and here, is whether the California courts had power to proceed with and determine the controversy; and the final judgment appealed from is that from the Superior Court

finally and—Petitioner contends—erroneously asserting its jurisdiction to deal with a controversy within the exclusive domain of the National Labor Relations Board, pursuant to *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959) and subsequent related decisions.

In *Langdeau*, the parties agreed that the state court order refusing a change of venue sought pursuant to a federal law urged by Petitioner, constituted the sole issue on appeal. This Court noted, at 558, that venue was a separate issue, not enmeshed with the merits of plaintiff's cause of action; and that it would best serve the policy of Section 1257 to consider venue now, rather than to subject both appellant and appellee to "long and complex litigation which may all be for naught," should its decision on the issue of venue be postponed.

The reference in *Langdeau* to "long and complex litigation" is particularly apposite. As Petitioner has noted (Petition, pp. 16-17), the state court determination of liability necessarily involves an adjudication of labor organization status, contrary to ruling of this Court in *Marine Engineers* v. *Interlake Steamship Company*, 370 U.S. 173 (1962), that such determination is for the National Labor Relations Board. Thus, a final judgment of damages immediately raises new and additional issues as to just what part or parts of that entity designated "Local Union No. 542" must respond in damages pursuant to such judgment. An appeal thereafter will therefore be additionally complicated by these new issues which can be avoided if the present review is granted.

For the additional reasons stated in both *Curry* and *Langdeau*, as well as those uncontroverted by Respondent, this Court has jurisdiction of the within Petition.

III. THE FEDERAL QUESTION HAS BEEN PRESERVED.

As Petitioner has related (Petition, pp. 7-11), the federal question has been urged and preserved at every stage of this litigation; and this fact is revealed by the most cursory examination of the record, or any part thereof. The California decision of *Gore* v. *Bingaman*, 20 Cal.2d 118, 124 P.2d 17 (1942), dealing with the so-called "law of the case" doctrine, can have no application to this dispute, where Respondent concedes "The only question not foreclosed by "law of the case" is the issue of jurisdiction." (Respondent's Brief, p.8)

Respondent appears to urge that Petitioner has waived the federal question of jurisdiction by urging pre-emption on retrial, rather than by "preserv[ing] the federal question of preemption by availing itself of its remedies in higher courts after the first appeal . . ." However, Respondent cites no authority for this novel theory; and he appears to forget that the court in *Lewis* denied Petitioner, as the appellee, an appeal on the issue of pre-emption, although such appeal was seriously urged; and thus forced Petitioner to pursue this issue on remand.

IV. THE PETITIONER'S DILEMMA: WHY THE PETITION SHOULD BE GRANTED.

Petitioner has urged a number of reasons why the writ should be granted, and in particular has urged the applicability of the decisions of this Court in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 326 (1959) and such subsequent decisions as *Local 24 Teamsters* v. *Oliver*, 358 U.S. 283 (1959), 362 U.S. 605 (1960), and *Marine Engineers* v. *Interlake Steamship Company*, 370 U.S. 173 (1962).

Respondent declares these cases do not apply. Petitioner will not burden this Court with further exposition on these precise points: the contentions of both parties are now before the Court. Further discourse on the application of the pre-emption doctrine will be reserved, hopefully, for Petitioner's brief on the merits.

Petitioner here seeks only to correct the record as to Respondent's restatement of Petitioner's legal position; and to provide an illustration of the dilemma in which the present state of this proceeding places Petitioner.

Respondent contends that there is no meritorious legal issue in this petition, on the theory that any federal question decided by the California court must needs be

> "... in accord with *Allen-Bradley Co.* v. *Local Union No. 3 IBEW*, 325 U.S. 797 (1945) and *Gibony* v. *Empire Storage and Ice* [*Co.*], 336 U.S. 490 (1949). The state court decision at most could hold that a union is not immune from anti-trust laws where it combines with non-labor groups for a purpose lacking a legitimate labor objective." (Respondent, p.7)

Allen-Bradley and *Gibony* were of course decided prior to either *Garmon* decision or the development of the pre-emption doctrine. Further, the interdicted activities there found subject to antitrust regulation were concedely secondary boycotts, which are forbidden by Section 8(b) (4) of the Labor Management Relations Act, 1947 (Taft-Hartley), 29 U.S.C. Section 141. Section 303 of the Taft-Hartley Act provides, in addition, a federal remedy in damages for injuries sustained by secondary boycott activity.

In contrast, the state court has in the instant case decided that an uulawful intent to restrain trade may properly be *inferred* from the request of an autonomotus segment of a labor organization for higher wages from an employer with modern equipment, a modern operation, and a generally greater ability to pay, than it asked of employers with obsolescent equipment, obsolescent operations and a generally poor ability to pay. The state court has further held that such unlawful intent may be inferred from this request even though this course was decided upon by the interested segment alone, pursuant to majority vote, secret ballot and the full panoply of democratic processes.

It is submitted that, rather than the mild iteration of *Allen-Bradley* or *Giboney* suggested by Respondent, the decision of the state court below is a stern pronouncement which directs labor organizations that they bargain at their peril; and which will hold any union *in terrorem* at all stages of the bargaining process.

Under the rule established in the court below, it seemed evident that the only sure way for a labor organization to avoid the inference of "restraining trade" is to maintain uniformity of wage demands among employers. Yet, uniformity and negotiation are inconsistent principles; and wage negotiation presupposes consideration of the particular situation of the particular employer, including such factors as ability to pay, the number of employees required to produce the goods or services—i.e., those very factors considered by the responsible segment of Petitioner in the instant case.

The mutual duties of Employer and Union to bargain collectively are established in Sections 8(a)(5) and 8(b)(3) of the National Labor Relations Act as amended, 29 U.S.C. Section 151.

These mutual obligations have been declared by a member of the National Labor Relations Board as being at the heart of the Act, fulfilling the Act's general purpose of putting the parties on an equal bargaining basis. See Fanning, "The Duty to Bargain in '1962," 14 Labor Law Journal 18, at 24.

It seems apparent that if the labor organization must bargain under the omnipresent threat of a charge of tortious conspiracy—with attendant double damages under state law—the Employer has been given a new and potent weapon. In this context, the positions of the parties are far from equal; with this excessive bargaining advantage, the purposes of the National Labor Relations Act can be effectively frustrated.

Thus it may be seen that the effect of the state court decision is twofold: first, to deny a labor organization the benefit of the National Labor Relations Act which endeavors to put the union on an equal footing with the employer; and second, to make the union vulnerable to state "conspiracy" doctrine by permitting inferences of antitrust violation to be drawn from traditional bargaining demands.

The full import of such a doctrine, if allowed to prevail, is difficult to envision. It has been some time since the Mayor's Court in Philadelphia found certain of its journeymen cordwainers guilty of an unlawful conspiracy to raise their wages. (See *Commonwealth* v. *Pullis*, 3 Commons & Gilmore, *A Documentary History of American Industrial Society*, 59-248 (1910).) The law of labor relations has experienced considerable development since the *Philadelphia Cordwainers Case* and, as expressed both in statute and judicial decision, has moved some distance from that 1808 decision. However, a sober regard for the neces-

sary implications of the Petitioner's situation reveals that if the decision of the court below is allowed to stand, that distance may be traversed with great rapidity.

V. CONCLUSION.

For the foregoing reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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